A

SCK GROUP BHD & ANOR

v.

SUNNY LIEW SIEW PANG & ANOR

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HISHAMUDIN MOHD YUNUS JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-902-2007]
C 7 OCTOBER 2010

TORT: *Conspiracy to defraud - Standard of proof - Whether proof beyond reasonable doubt - Whether plaintiffs failed to establish - Whether trial judge's dismissal of plaintiffs' claim proper on evidence adduced*

D

This was an appeal by the plaintiffs (the appellants herein) against the decision of the trial judge dismissing their claim against the defendants (the respondents herein) on the tort of conspiracy to defraud the plaintiffs. The issue was whether the plaintiffs adduced sufficient evidence to establish beyond reasonable doubt their claim E against the defendants on the tort of conspiracy to defraud the plaintiffs. The plaintiffs cited the following six cases in support, *ie*, *Dato' Tan Toh Hua & Ors v. Tan Toh Hong & Ors; Re Crossmore Electrical and Civil Engineering Ltd; Re Hydrosan Ltd; Re A Company (No 004502 of 1988), ex p Johnson; Re CG & L Investment Ltd and* F *Wyatt Estate Ltd; and Re A Company (No 1126 of 1992)*.

Held (dismissing the appeal with costs)
Per Low Hop Bing JCA delivering the judgment of the court:

G **(1)** The tort of conspiracy was not constituted by the conspiratorial agreement alone. For conspiracy to take place, there must also be an unlawful object, or if not in itself unlawful, it must be brought by unlawful means. There must be a co-existence of an agreement with an overt act causing damage to the plaintiffs. H Hence, the tort was complete only if the agreement was carried into effect thereby causing damage to the plaintiffs. (para 14)

(2) In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish: (i) an agreement between two or more persons; (ii) for the purpose of injuring the plaintiff; and I (iii) acts done in the execution of that agreement resulted in damage to the plaintiff. (para 14)

(3) As the tort of conspiracy to defraud involved an element of fraud, the standard of proof required was very high. It was proof beyond reasonable doubt. (para 15)

(4) The six authorities submitted by the plaintiffs were of no assistance to them as the said authorities did not contain any ratio or proposition of law to support the tort of conspiracy to defraud the plaintiffs. The authorities also did not expound on the burden and standard of proof required for the tort. (para 19)

(5) Although the plaintiffs' claim alleged that Yeoh, Cheong, Soon and Lim had conspired with the defendants to defraud the plaintiffs, the plaintiffs had not named those alleged co-conspirators as co-defendants in the action. The plaintiffs also did not give any reason or explanation. (para 20)

(6) The trial judge pointed out that the evidence of the plaintiffs' only witness had not established the existence of any agreement between the defendants and the alleged co-conspirators in order to cause damage to the plaintiffs, nor was there any act done by them in execution thereof. It was also found that the first defendant was instructed by the plaintiffs' then representatives to do work on behalf of the plaintiffs, and that the defendants carried out the professional work according to the plaintiffs' instructions. The defendants then sent the said invoices to the plaintiffs for the work actually carried out. In the plaintiffs' amended statement of claim, they averred that the defendants dishonestly assisted the alleged co-conspirators to defraud the plaintiffs. The plaintiffs' evidence of alleged dishonesty was actually directed against the alleged co-conspirators. The trial judge made a specific finding of fact that the plaintiffs failed to adduce any evidence to prove the defendants' dishonesty, and that the payments to the defendants were made in accordance with the invoices issued by the defendants for work done on the instructions of the previous management of the plaintiffs. The trial judge's specific finding of facts was based on and supported by evidence adduced before him. In the absence of any error thereof, there was no ground for appellate interference. The trial judge was right in dismissing the plaintiffs' claim against the defendants. (paras 21-24)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan plaintif-plaintif (perayu-perayu di sini) terhadap keputusan hakim bicara kerana menolak tuntutan tort konspirasi untuk menipu mereka terhadap defendan-defendan (responden-
B responden di sini). Isunya adalah sama ada plaintif-plaintif telah mengemukakan keterangan yang mencukupi untuk membuktikan tort konspirasi untuk menipu tersebut terhadap defendan-defendan di luar keraguan munasabah. Plaintif-plaintif telah mengemukakan kes-kes berikut bagi menyokong tuntutan mereka, iaitu *Dato' Tan Toh*
C *Hua & Ors v. Tan Toh Hong & Ors; Re Crossmore Electrical and Civil Engineering Ltd; Re Hydrosan Ltd; Re A Company (No 004502 of 1988), ex p Johnson; Re CG & L Investment Ltd and Wyatt Estate Ltd; dan Re A Company (No 1126 of 1992)*.

D **Diputuskan (menolak rayuan dengan kos)**
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Tort konspirasi tidak berlaku atas perjanjian untuk berkonspirasi semata-mata. Bagi mewujudkan konspirasi, harus juga wujud
E suatu objek yang salah, atau, jika tidak dengan sendirinya salah, objek yang berbangkit melalui jalan yang salah. Kedua-dua perjanjian dan perlakuan salah yang menyebabkan kemudaratan kepada plaintif-plaintif ini harus wujud secara bersesama. Oleh itu, perlakuan tort ini hanya sempurna jika perjanjian
F dilaksanakan, sekaligus menyebabkan kemudaratan kepada plaintif-plaintif.

(2) Untuk berjaya dalam suatu tuntutan tort konspirasi, plaintif-plaintif hendaklah membuktikan: (i) satu perjanjian di antara
G dua orang atau lebih; (ii) bermaksud untuk memudaratkan plaintif-plaintif; dan (iii) perbuatan yang dilakukan ekoran dari perjanjian menyebabkan kemudaratan kepada plaintif-plaintif.

(3) Oleh kerana tort konspirasi untuk menipu melibatkan elemen
H menipu, standard pembuktian yang diperlukan adalah sangat tinggi. Ia adalah bukti di luar keraguan munasabah.

(4) Enam autoriti yang dikemukakan oleh plaintif-plaintif tidak membantu mereka oleh kerana autoriti-autoriti tersebut tidak mengandungi ratio atau proposisi undang-undang yang
I menyokong tort konspirasi untuk menipu plaintif-plaintif. Autoriti-autoriti juga tidak menekankan mengenai beban dan standard pembuktian yang diperlukan bagi tort itu.

(5) Walaupun tuntutan plaintif-plaintif mendakwa bahawa Yeoh, Cheong, Soon dan Lim telah berkonspirasi untuk menipu plaintif-plaintif, plaintif-plaintif tidak menamakan 'co-conspirators' tersebut sebagai defendan bersama di dalam tindakan. Plaintif-plaintif juga tidak memberi sebarang alasan atau penjelasan.

(6) Hakim bicara menyatakan bahawa keterangan oleh saksi tunggal plaintif-plaintif gagal membuktikan kewujudan apa-apa perjanjian di antara defendan-defendan dan 'co-conspirators' bagi memudaratkan plaintif-plaintif, dan begitu juga tiada apa-apa perbuatan oleh mereka bagi melaksanakan perjanjian sedemikian. Juga didapati bahawa defendan pertama telah diarah oleh wakil plaintif-plaintif bagi melakukan kerja-kerja bagi pihak plaintif-plaintif, dan bahawa defendan-defendan telah menjalankan kerja-kerja professional tersebut mengikut arahan plaintif-plaintif. Berikutnya, defendan-defendan menghantar kepada plaintif-plaintif invois-invois berkenaan bagi kerja-kerja sebenar yang dilakukan. Dalam pernyataan tuntutan terpinda plaintif-plaintif, plaintif-plaintif menyatakan bahawa defendan-defendan telah secara curang membantu 'co-conspirators' untuk menipu plaintif-plaintif. Maka keterangan plaintif-plaintif mengenai kecurangan adalah sebenarnya ditujukan kepada 'co-conspirators'. Hakim bicara telah membuat dapatan fakta yang spesifik bahawa plaintif-plaintif gagal mengemukakan sebarang keterangan bagi membuktikan kecurangan defendan-defendan, dan bahawa pembayaran kepada defendan-defendan adalah dibuat selaras dengan invois-invois yang dikemukakan oleh defendan-defendan bagi kerja-kerja yang dilaksanakan atas arahan pengurusan terdahulu plaintif-plaintif. Dapatan fakta spesifik yang dibuat oleh hakim bicara adalah berdasarkan dan disokong oleh keterangan yang ada di hadapannya. Dalam ketiadaan apa-apa kekhilafan olehnya, maka tiada alasan untuk campurtangan di peringkat rayuan. Hakim bicara betul dalam menolak tuntutan plaintif-plaintif terhadap defendan-defendan.

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

Chai Kah Sim v. Ishak Saad [1986] 1 CLJ 537; [1986] CLJ (Rep) 80 SC ***(refd)***

Dato' Tan Toh Hua & Ors v. Tan Toh Hong & Ors [2001] 1 CLJ 733 CA ***(refd)***

Davies v. Thomas [1920] 2 Ch 189 ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

A *Jeremiah v. Lee Yew Kwai [1965] 1 LNS 65 PC* ***(refd)***
Koh Jui Hiong & Ors v. Ki Tak Sang & Ors [2009] 10 CLJ 205 HC ***(refd)***
Marrinan v. Vibart [1962] 1 All ER 869 ***(refd)***
MBF Finance Bhd v. Sim Peng Bee & Anor [2003] 1 CLJ 690 HC ***(refd)***
Nuri Asia Sdn Bhd v. Fosis Corporation Sdn Bhd [2006] 5 CLJ 307 HC ***(refd)***
B *Re A Company (No. 004502 of 1988), ex p Johnson [1992] BCLC 701* ***(refd)***
Re A Company (No. 1126 of 1992) [1994] 2 BCLC 146 ***(refd)***
Re CG & L Investment Ltd and Wyatt Estate Ltd [1992] 1 HKC 78 ***(refd)***
Re Crossmore Electrical and Civil Engineering Ltd [1989] BCLC 137 HC ***(refd)***
C *Re Hydrosan Ltd [1991] BCLC 418 HC Ch D* ***(refd)***
RHB Bank v. Treasure Island Resorts Sdn Bhd & Ors [2004] 4 CLJ 773 CA ***(refd)***
Saminathan v. Papa [1980] 1 LNS 174 PC ***(refd)***
Seah Siang Mong v. Ong Ban Chai & Another Case [1998] 1 CLJ Supp 295 HC ***(refd)***
D *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 2 CLJ 146 SC* ***(refd)***
Tenaga Nasional Bhd (formerly Lembaga Letrik Negara Tanah Melayu) v. Perwaja Steel Sdn Bhd (formerly Perwaja Terengganu Sdn Bhd) [1995] 4 CLJ 670 HC ***(refd)***
E *Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 CA* ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181
Evidence Act 1950, s. 101(1), (2)

F **Other source(s) referred to:**
Halsbury's Laws of England, 4th edn, vol 45, p 271

For the appellants - N Navaratnam (Wong Wye Wah with him); M/s Kadir, Andri & Partners
For the respondents - Andrew Khoo; M/s Khoo & Sidhu
G
[Appeal from High Court, Kuala Lumpur; Suit No: D5-22-1523-2001]

Reported by Usha Thiagarajah

H **JUDGMENT**

Low Hop Bing JCA:

Appeal

I **[1]** After a full trial, the Kuala Lumpur High Court dismissed with costs the claim of the appellants ("the plaintiffs"). On 31 May 2010, we heard and dismissed the plaintiffs' appeal against the decision of the High Court. We now give our grounds.

Finding Of Facts By High Court

[2] The second plaintiff is the wholly owned subsidiary of the first plaintiff.

[3] On 14 July 1997, Wong Kok Poh (PW1) and one Rita Tan resigned as directors of the first and second plaintiffs, while Sydney Lim ("Lim"), Cheong Ho Kuan ("Cheong") and Wisun Soon ("Soon") were appointed as executive directors of the first plaintiff.

[4] On 21 July 1997, one Yeoh Lam Jit ("Yeoh") was appointed as the chief executive officer ("CEO") of the first and second plaintiffs. Lim, Cheong and Soon were appointed to the board of directors of the second plaintiff and other subsidiaries of the first plaintiff.

[5] On 10 April 1998, four shareholders of the first plaintiff commenced a petition under s. 181 of the Companies Act 1965 against Yeoh, Lim, Cheong and Soon *vide* Originating Petition No. D2-26-17-1998 ("the s. 181 petition") alleging, *inter alia*, that the affairs of the first plaintiff are managed in an oppressive and prejudicial manner. The first plaintiff was named as a party.

[6] On 11 April 1998, an *ex parte* order was made in the s. 181 petition, appointing two public accountants from Arthur Andersen as Receivers and Managers ("R & M") of the first plaintiff. The R & M then took over the powers and duties of the first plaintiff's directors. On 19 June 1998, the *ex parte* order was set aside.

[7] On 18 June 1998, Yeoh filed an *ex parte* Originating Summons No. D2-24-267-1998 ("the *ex parte* OS") in his personal capacity, seeking a scheme of arrangement and the restructuring of the plaintiffs and their subsidiaries. On 20 June 1998, an order in terms was made in the *ex parte* OS to last for three months.

[8] On 1 July 1998, PW1 and Rita Tan filed Suit No. S2-23-44-1998 against Soon ("the defamation suit"). On 11 August 1998 and 4 September 1998, the defendants' firm, M/s Liew Hazalina, filed a memorandum of appearance and defence respectively for Soon in the defamation suit.

[9] The second plaintiff made payments to the defendants' firm, itemised as follows:

A (1) Invoice No. SJY.908192.L1(001) for RM105,385 for legal work done and disbursements incurred in the s. 181 petition;

(2) Invoice No. SJY.980179.C4(001) for RM50,080 to the first plaintiff for professional work done and disbursements incurred with regard to the joint-venture agreement between the second plaintiff and one Euro Incentive Sdn Bhd;

B

(3) Invoice No. SJY.980120.L1 and SJY.980120.L1(004) for RM90,300.50 and RM64,000 respectively for professional work and disbursements incurred in relation to the *ex parte* OS;

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(4) Invoice No. SJY.97006.C1(001) for the sum of RM154,704.40, being professional fees and disbursements incurred in respect of a series of transactions for the acquisition by Eastwards Ventures Sdn Bhd of an entity known as C.Y. Properties Sdn Bhd;

D

(5) Invoice No. SJY.970178.C1(002) for RM31,939 to the first plaintiff for professional work and disbursements done in respect of KIK Sdn Bhd and Sujitec Sdn Bhd;

E

(6) Invoice No. SJC.980050.C1(001) for RM47,465 to the first plaintiff for professional work done and disbursements incurred in respect of a transaction in which Yeoh was negotiating to sell his personal shareholding in the first plaintiff to another individual; and

F

(7) RM25,000 to the defendants for Administration of "Litigation Fund" pursuant to the resolution for the non-refundable litigation fund.

G **[10]** On 18 September 1998, at the annual general meeting of the first and second plaintiffs, Yeoh resigned as the CEO while all the directors were removed by the shareholders.

[11] On 30 September 1998, a new board of directors rescinded the resolution for the non-refundable litigation fund.

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[12] Subsequently, the plaintiffs filed the writ of summons against the defendants in the High Court based on the tort of conspiracy to defraud the plaintiffs. The plaintiffs' writ was dismissed by the High Court. Hence this appeal by the plaintiffs.

I

Conspiracy To Defraud: Burden And Standard Of Proof

[13] The plaintiffs, who desire the court to give judgment as to the legal right or liability, dependent on the existence of facts which he asserts in relation to the tort of conspiracy to defraud the plaintiffs, bear the burden of proving their case. Section 101(1) and (2) of the Evidence Act 1950 merit reproduction as follows:

> **101 Burden of proof**
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

(See eg, *MBF Finance Bhd v. Sim Peng Bee & Anor* [2003] 1 CLJ 690; *Tenaga Nasional Bhd (formerly Lembaga Letrik Negara Tanah Melayu) v. Perwaja Steel Sdn Bhd (formerly Perwaja Terengganu Sdn Bhd)* [1995] 4 CLJ 670, *Nuri Asia Sdn Bhd v. Fosis Corporation Sdn Bhd* [2006] 5 CLJ 307; and *Koh Jui Hiong & Ors v. Ki Tak Sang & Ors* [2009] 10 CLJ 205).

[14] The tort of conspiracy is not constituted by the conspiratorial agreement alone. For conspiracy to take place, there must also be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means: See *Davies v. Thomas* [1920] 2 Ch 189 per Warrington LJ, and *Seah Siang Mong v. Ong Ban Chai & Another Case* [1998] 1 CLJ Supp 295 HC per Ghazali J (now FCJ). There must be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish:

(1) an agreement between two or more persons;

(2) for the purpose of injuring the plaintiff; and

(3) acts done in the execution of that agreement resulted in damage to the plaintiff: *Marrinan v. Vibart* [1962] 1 All ER 869, 871 per Salmon J; and *Halsbury's Laws of England* (4th edn.) Vol. 45 p. 271, as applied by Ghazali J (now FCJ) in *Seah Siang Mong, supra*

[15] As the tort of conspiracy to defraud involves an element of fraud, the standard of proof required is very high. It is proof beyond reasonable doubt. In *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 at pp. 233a-g, 234a-h & 235a-d, Steve Shim CJ (Sabah & Sarawak) (as he then was) applied the Privy Council advice given by Lord Diplock in *Saminathan v. Papa* [1980] 1 LNS 174 and held that the standard of proof for fraud in civil proceedings is proof beyond reasonable doubt. This high standard of proof was reaffirmed by the Federal Court in *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1 where Nik Hashim FCJ (as he then was) said at p. 19 [12] that "It is now settled law that the standard of proof required where there is allegation of fraud in civil proceedings must be one beyond reasonable doubt and not on a balance of probabilities". (See also *Seah Siang Mong, supra*)

Evidence

[16] Plaintiffs' learned counsel, Mr N Navaratnam (assisted by Ms Wong Wye Wah) submitted that it is trite law that assets of a company cannot be used for the purpose of funding the directors' personal litigation. Reference was made to:

(1) *Dato' Tan Toh Hua & Ors v. Tan Toh Hong & Ors* [2001] 1 CLJ 733 CA;

(2) *Re Crossmore Electrical and Civil Engineering Ltd* [1989] BCLC 137 HC Ch D;

(3) *Re Hydrosan Ltd* [1991] BCLC 418 HC Ch D;

(4) *Re A company (No. 004502 of 1988), ex p Johnson* [1992] BCLC 701 HC Ch D;

(5) *Re CG & L Investment Ltd and Wyatt Estate Ltd* [1992] 1 HKC 78 CA Hong Kong; and

(6) *Re A Company (No. 1126 of 1992)* [1994] 2 BCLC 146 HC Ch D.

[17] Learned counsel Mr Andrew Khoo contended for the defendants that the plaintiffs had failed to establish the tort of conspiracy to defraud the plaintiffs beyond reasonable doubt.

[18] The issue raised in the instant appeal is whether the plaintiffs have adduced sufficient evidence to establish beyond reasonable doubt their claim against the defendants founded on the tort of conspiracy to defraud the plaintiffs.

[19] We note that the submission presented for the plaintiffs and all the six authorities cited in support thereof did not concern the plaintiff's claim, which is based on the tort of conspiracy to defraud the plaintiffs. Having had the opportunity of considering all the aforesaid six authorities, we are of the view that none of them contains any ratio or proposition of law to support this tort. These authorities also do not expound on the burden and standard of proof required for this tort. Hence, we take the view that they are clearly of no assistance to the plaintiffs in the instant appeal.

[20] Next, it is significant for us to observe that although the plaintiffs' claim alleged that Yeoh, Cheong, Soon and Lim had conspired with the defendants to defraud the plaintiffs, the plaintiffs had not named these alleged co-conspirators as co-defendants in the action. The plaintiffs also did not give any reason or explanation therefor.

[21] The learned trial judge pointed out that the evidence of the plaintiffs' only witness (PW1) had not established the existence of any agreement between the defendants and the alleged co-conspirators in order to cause damage to the plaintiffs, nor was there any act done by them in execution thereof.

[22] In evaluating the evidence adduced for the defendants, the learned trial judge found that the first defendant, Sunny Liew Siew Pang (DW1) was instructed by the plaintiffs' then representatives to do work on behalf of the plaintiffs, and that the defendants carried out the professional work according to the plaintiffs' instructions. The defendants then sent the said invoices to the plaintiffs for the work actually carried out. The invoices for which the defendants had been paid are to be found at pp. 53-54 (P19), 55-56 (P21), 57-59 and 63-64 (P22), 65-66 (P26), 109 (P31) and 110 (P33) of "Ikatan Dokumen-Dokumen Plaintif Yang Mana Keesahannya Dipersetujui Dan Kandungannya Diakui": Bundle B, by which the plaintiffs are deemed to have agreed and admitted the truth of the particulars and contents thereof. In *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 FC, at p. 522, Peh Swee Chin FCJ (as he then was) said "... if there are any express conditions or terms in regard to the inclusion of any document to the agreed bundle, then the document would have to be dealt with according to and subject to such express conditions".

[23] Further, paras 13, 14 and 15 of the plaintiffs' amended statement of claim averred that the defendants have dishonestly assisted the alleged co-conspirators to defraud the plaintiffs. The plaintiffs' evidence of alleged dishonesty was actually directed against the alleged co-conspirators. The learned trial judge made a specific finding of facts that the plaintiffs have failed to adduce any evidence to prove the defendants' dishonesty, and that the payments to the defendants were made in accordance with the invoices issued by the defendants, for work done on the instructions of the previous management of the plaintiffs.

[24] We are of the view that the learned trial judge's specific finding of facts was based on and supported by evidence adduced before him. In the absence of any error, there is no ground for us to embark on any appellate interference: See eg:

(1) *RHB Bank v. Treasure Island Resorts Sdn Bhd & Ors* [2002] 4 CLJ 773 CA;

(2) *Chai Kah Sim v. Ishak Saad* [1986] 1 CLJ 537; [1986] CLJ (Rep) 80 SC;

(3) *Jeremiah v. Lee Yew Kwai* [1965] 1 LNS 65 PC; and

(4) *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1993] 2 CLJ 146 SC.

Conclusion

[25] On the foregoing grounds, we held that the learned trial judge was right in dismissing the plaintiffs' claim against the defendants. This appeal, being without merits, was dismissed with costs of RM15,000. The decision of the High Court was affirmed. Deposit to the respondents (defendants) on account of the fixed costs.